INDEX

	Page
Statement of the case	2
First ground of jurisdiction	6
Explanatory statement	7
Second ground of jurisdiction	10
Supporting statement	10
Assignments of error	18
Prayer for the writ	20

Authorities

Hansberry v. *Lee*, 311 U. S. p. 32, 85 L. Ed. 22	15
Postal Tel. Cable Co. v. *Newport*, 247 U. S. 464, 62 Law Edition, 1215	16
Scott v. *McNeal*, 154 U. S. 34	17
Coe v. *Armour Fertilizer Works*, 237 U. S. 413, 59 Law Ed. 1027	17
Great Northern R. R. Co. v. *Sunburst O. & R. Co.*, 287 U. S. 358-367, 77 L. Ed. 360	18

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 272

MARY WALL KIRBY ET AL.,
Petitioners,

vs.

HOUSTON OIL CO. OF TEXAS ET AL.
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, 9TH SUPREME JUDICIAL DISTRICT OF TEXAS, AND AUTHORITIES IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Mary Wall Kirby, et al., present this application to your Honors for Writ of Certiorari to review and correct the decision rendered against them by the 9th Court of Civil Appeals, in the case styled as in the above Caption, as Appellants vs. Houston Oil Co., of Texas et al., respondents, as appellees, and by the Supreme Court of Texas, which refused to review the action of said Court of Civil Appeals on application for writ of error, its final order

being entered on a motion for rehearing on June 11th, 1947; and for cause petitioners present:

I

Statement of the Case

The petitioners, residents of Bandera County in west Texas, claiming as owners 19 acres of valuable mineral land in Hardin County, east Texas, sued respondents as trespassers to recover it. As the widow and children of the grantee, Dr. H. S. Kirby, they claimed title by warranty deed dated in 1904 executed to him by two grantors, Louisa J. Frazier and her husband W. S. Frazier. (See deed, R. 17-18). It was a part of the Frazier 160 acre homestead tract in a large survey. This case was decided against them based upon the legal effect, as *res judicata,* of a default or *nil dicit* judgment rendered in 1899 (five years before the deed in question) in favor of the Respondents' predecessors, Texas Pine Land Association, against W. S. Frazier alone; the courts below holding that the title was divested out of both the grantors by the judgment against one of them. (See copy of judgment, R. 15-16).

The Fraziers were each separately invested with equal estates which, under the law of Texas, were indivisible and inseparable in the 160 acre tract on which they had lived, as their homestead, for 25 years before the judgment in 1899, and for 30 years before they sold a part of it to Dr. Kirby under whom petitioners hold.

They had settled on the land the latter part of 1873 or first part of 1874 and had continuously used and cultivated a portion of the 160 acres, raising a family of nine children and claiming title thereto under Article 5510 of the Texas statute of 10 years limitation.

The holders of the technical paper title to the league of land upon which this homestead was situated were non-

residents, and were not parties or privies to the judgment against Frazier.

No attempt was ever made to enforce this judgment or to disturb in any wise Frazier's possession. Twenty-six years after the judgment was rendered—21 years after petitioners' deed was made—respondents recovered a judgment against the owners of the superior title to the league, on a verdict based on ten years' adverse possession under recorded muniments, purporting to be a junior chain of title. (R. 31-2).

Neither the Fraziers nor these petitioners were parties thereto nor had anything to do with that proceeding. It was produced by respondents as defense to this suit. The Frazier family continued this occupancy of the homestead, less the 19 acres sold to Dr. Kirby, until Frazier's death in 1912 and his wife's death some 10 years later.

The first attempted encroachment on petitioners' tract, on which they regularly paid all taxes but did not take pedal possession thereof, was some three years prior to the filing of this suit, when respondent, American Republic Oil Co. erected a derrick and drilled an oil well thereon.

The trial court on motion of respondents instructed the jury to return a verdict for them, and judgment was entered accordingly.

The case was appealed to the 9th Court of Civil Appeals, and there affirmed upon the ground that the judgment against Frazier alone had "the effect of divesting title out of W. S. Frazier and wife" (L. J. Frazier); and therefore destroyed the title conveyed by the Fraziers in 1904 to Dr. H. S. Kirby.

Assignments of Error challenging the action of the lower court upon any theory of the case developed under the facts, were presented on the appeal, and the Court refused to consider the same, using the following language:—"The view

we take of the effect that must be given to the judgment in Cause # 570, styled W. S. Frazier v. Texas Pine Land Association, renders it unnecessary for us to pass upon any other points presented." (R. 9). And again:— "Being of the opinion that said judgment divested such title as W. S. Frazier and wife might have had to the 19 acres here involved, and no contention being made that any title had been acquired by appellants to said 19 acre tract other than that of W. S. Frazier and wife since the date of said judgment, it follows that the trial court was fully authorized to instruct a verdict against the appellants. Should there be error presented by the other points presented by appellants they would necessarily be harmless error as appellants showed no title to the mineral estate sued for, and a take nothing judgment would be as effective and preclusive against appellants as the judgment entered by the Court."

The petitioners are presenting under the third division of this paper the Assignments of Error addressed to that feature of the case, which assignments the Court of Civil Appeals refused to consider, and overruled.

Since the Supreme Court under Texas statute (Vernon's Ann. Stat. Vol. 3 p. 256) had final jurisdiction to review the case, petitioners seasonably applied to that Court for Writ of Error (R. 13). It was "Refused without comment" on April 30th, 1947 (R. 55).

Thereupon petitioners filed a printed motion for Rehearing. It is brought here in full; as are also the original application for the writ of error, and Respondents' Answer thereto (R. 56). Because the Motion fully presents and develops the issue here, we are lodging with the record ten printed copies for the Court's inspection, as well as copies of the other two documents.

The chief constitutional question here raised was presented to that court in these terms:—

> "First Point" The petitioners, standing in the shoes of both parties who owned in unseverable and inseparable title, interest and estate, the land in controversy, are clothed with the rights of both. And the plea of res adjudicata under the judgment against Frazier alone, is void of effect as to the title to that homestead and the portion thereof here involved. To hold that the wife was bound by that judgment against her husband, and that thereby the homestead itself was destroyed, is to deprive such person whose estate is taken of the right of due process of law, without such person ever being brought before the court.
>
> "It is in express violation of Art. 1, Section 19 of the Texas Constitution, which reads: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities * * * except by the due course of the law of the land."
>
> "And it is also violative of the Federal Constitution, Art. 14, Sec. 1, that: "no State shall 'deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' "

The motion also pointed out that the action of the Court of Civil Appeals was also a denial of the "equal protection of the law" guaranteed by the Constitution, in that from the earliest to the latest decisions the Supreme Court of Texas had held that such judgments, in cases where parties owned their homestead, against a husband alone, were null and void—not only against the wife, not party to such suits, but also as against the husband himself. Such decisions uniformly have so construed the Constitution and statutes of Texas affecting homesteads. These decisions were cited, quoted from and analyzed in the Motion for Rehearing in the Supreme Court of Texas, pp. 17 to 29; (R. 73-85).

The order of the Supreme Court entered June 11th, 1947 was as follows:

"June 11, 1947.

"No. A-1214. On Re-hearing of the case Mary Wall Kirby *vs.* Houston Oil Co. et al. from Hardin, 9th District.

The motion for Rehearing herein filed by the petitioners, having heretofore been submitted to the Court, and after due consideration of same, it is ordered that the said motion be, and is hereby overruled."

The record was returned to the Court of Civil Appeals for final enforcement of its decree.

A stay of Mandate was then granted to enable petitioners to apply for this Writ of Certiorari.

Grounds of Jurisdiction and Reasons for Granting of the Writ

First Ground

It being the established law of Texas laid down in Art. 16, Section 50 of the Constitution, and in the Homestead provisions of Arts. 1300-4618 of the Statutes, and uniformly construed and declared by the Supreme Court of the State that the title to land acquired and held as homestead is an equal, invested, inseparable estate in each party, and cannot be divested, annulled, conveyed or encumbered by the separate action of either, in voluntary or involuntary proceedings, nor can it be done by any agency of the State in the form of a judgment, such judicial action against one alone being null and void as to both:

The Courts below therefore, erred in holding that petitioner's title was annulled and destroyed by the default or "nil dicit" judgment entered against W. S. Frazier alone, without the presence as a party to the suit of his

wife, L. J. Frazier; and that it was *res judicata* of the title to the portion of the homestead vested by their joint deed in Dr. Kirby.

Such decision is in violation of Art. 14, Section 1 of the constitution of the United States, and is a denial to these petitioners of due process of law.

Explanatory Statement

Article 16, Section 50 of the Texas Constitution reads as follows:

> "The homestead of a family shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, and in this last case only when the work and material are contracted for in writing, with the consent of the wife given in the same manner as is required in making a sale and conveyance of the homestead; nor shall the owner, if a married man, sell the homestead without the consent of the wife, given in such manner as may be prescribed by law. No mortgage, trust deed, or other lien on the homestead shall be ever valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage or trust deed, or other lien, shall have been created by the husband alone, or together with his wife; and all pretended sales of the homestead involving any condition of defeasance shall be void."

Article 4618 of the Texas statute on Husband and Wife, relating to homestead rights, reads as follows:

> "Art. 4618. 4621, 2967, 2651. Sale of Homestead.
> "The homestead, whether the separate property of the husband or wife, or the community property of both, shall not be disposed of except by the joint con-

veyance of both the husband and the wife, except where the husband is insane or has permanently abandoned the wife, in which instances the wife may sell and make title to any such homestead, if her separate property, in the manner herein provided for conveying or making title to her other separate property."

Article 1300 of the Texas statutes relating to conveying of the Homestead rights, reads as follows:

> "Art. 1300. (1115. 636. 560) Conveyance of Homestead.
>
> "The homestead of the family shall not be sold and conveyed by the owner, if a married man, without the consent of the wife. Such consent shall be evidenced by the wife joining in the conveyance, and signing her name thereto, and by her separate acknowledgement thereof taken and certified to before the proper officer, and in the mode pointed out in Articles 6605 and 6608."

The Supreme Court of Texas in the following cases has uniformly held that the homestead is an estate in land: *Stevens* v. *Coburn,* 213 S. W. 925 (opinion by Greenwood); *Green* v. *White,* 153 S. W. 2d. 525 *Rutledge* v. *Mitchell,* 95 S. W. 2d 1135, as follows:

> "Homestead estate is dependent upon some title or interest in property, and does not exist as separate estate in property, independently of such title or interest." (McLendon, C. J.)

Sayers v. *Pyland,* 161 S. W. 2d 769 (Alexander, C. J.):

> "Owner homestead right in property can never rise any higher than the rights, title or interest that he owns in the property attempted to be impressed with a homestead right."

Plough v. *Moore,* 56 S. W. 2d 68:

> "One claiming homestead exemption should allege the facts and not conclusions," to establish homestead. The necessary fact, of course, being the allegation of title.

Article 5510 of the Texas civil statutes relating to ten years adverse possession reads as follows:

> "Art. 5510. (5675-5676) (3343) Ten years' possession.
>
> "Any person who has the right of action for the recovery of lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward. The peaceable and adverse possession contemplated in this article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually enclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument."

The Supreme Court of Texas early laid down the law, in *Campbell* v. *Elliott,* 52 Tex. 151, as follows:

> "The homestead estate * * * unlike an estate by joint tenancy, can be vested in but two persons only who are regarded as but one in law; who are seized not of undivided moiety of the whole, but each takes in entirety * * * who cannot alienate separately but must alienate jointly; who cannot sever at pleasure but hold an estate which, when it remains theirs, is unseverable; who cannot partition unless in a di-

vorce proceeding severing their matrimonial relations, and who have not the right of survivorship, but upon the decease of either spouse the other continues to hold the entire homestead claim as such."

Second Ground

When the Frazier judgment was rendered in 1899 it was void under the constitution and statutes of Texas as construed by the Texas Supreme Court in uniform decisions; and under the case of *Mexia* v. *Lewis,* 21 S. W. 1017, decided in 1893 on facts identical with the case at bar. When, therefore, in 1912 that Court of Civil Appeals, with an entirely new personnel, ruled to the contrary in an uncontested appealed case styled *Breath* v. *Flowers,* 95 S. W. 26—unapproved by the Supreme Court and contrary to its decisions and to all other Courts of Civil Appeal, it did not and could not by retroactive effect render valid a "judgment" void under the law then existing, so as to impeach and destroy *ex post facto,* petitioners' title: and the holding that it did have that effect in this case is a violation of the 14th Amendment of the Federal constitution, and an arbitrary denial to these petitioners of due process of law and equal protection of the law.

Supporting Statement

See analysis in Motion for Rehearing, *Breath* v. *Flowers, supra,* on pages 6 and 7 (R. 6-7); and other appellate court cases on pages 19 to 29 (R. 75-85).

The Court of Civil Appeals in this case said: "Appellants have cited many cases in support of their contention that Mrs. L. J. Frazier was a necessary party to the suit in question in order for the judgment to have any validity, including the case of *Mexia* v. *Lewis et al.,* 21 S. W. 1016, which seems to directly support the contentions here made by them." Then follows the statement that the Court in 1912 ruled contrary to the *Mexia-Lewis* case in *Breath* v.

Flowers et al.; concluding that therefore the judgment against Frazier alone divested Mrs. Frazier of her title, and thus rendered petitioners' conveyance void of title.

The established law of Texas is that the identity and separate rights of the two persons existing before marriage, remain inviolate thereafter as to homestead and estate. Neither by voluntary or involuntary process can the rights of one be taken away by the other, nor can their united rights be affected thereby. The separate proceeding is void as to both. (See Motion for Rehearing, p. 17; 25-26; 28, 29, 32; R. 26).

The Beaumont Court of Civil Appeals by its former Chief Justice in deciding the same question here, held that the holder of title under such judgment "Acquired no rights against (the wife) Lucy Smith's claim of homestead by its judgment against (the husband) Monroe Smith, to which she was not a party." (*Smith* v. *Waverley,* 70 S. W. 2d 201; approved by Writ of Error refused by the Texas Supreme Court).

To the same effect is *Harper* v. *Stewart,* 179 S. W. 277, cited and approved in the *Smith* case, *supra.* (Quoted in Motion, pp. 25-26) (R. 81-2).

To the same effect is the recent case of *Behrens* v. *Behrens* (1945), 186 S. W. 2d 687; in which the language of the Court is as follows:—

"The wife was not a party to the suit or the oral agreement made in open court to render judgment divesting the husband of his inheritable or other interest in the land and consequently, she is not bound by either the judgment or the agreement to enter such final judgment under the aforementioned rule controlling such matters. When the homestead interest of the wife became thus involved in the suit, she thereby became a necessary party to the suit, to the oral agreement made in open court to later enter the judgment divesting her husband of all title or interest in the land, and

to the agreed judgment itself. We further hold that the homestead claim of the wife could not be conveyed or divested by Counsel for her husband in this case. She was not a party to the suit or settlement agreement and the homestead cannot be conveyed by any such method.

"These facts as alleged and testified to clearly raise the homestead right of the wife in the premises so occupied and used for a long period of years. This homestead of the wife could not be defeated in a suit to which she was not a party. Jergens v. Schiele, 61 Tex. 255; Cooley v. Miller, 227 S. W. 1085." (Writ of Error refused by Supreme Court).

In a recent case, 132 S. W. 2d 552, the principle is reaffirmed by the Texas Supreme Court in these words:—

"Until the abandonment takes place the husband's deed alone conveys nothing, and cannot be held as a restriction on the right of or as an impediment to the conveyance of the homestead to another in the constitutional and statutory way."

In *Harper* v. *Stewart, supra,* the Court in a homestead case held the judgment against the husband alone void, quoting the *Mexia-Lewis* decision as follows:—

" 'As to all of the land which was used and occupied as a homestead by Lewis and wife at the time of the institution of the first suit, the judgment obtained against Lewis in that suit was inoperative and of no effect as to either Lewis or his wife. Mrs. Lewis was not a party to that suit and the homestead right was not put in issue. Whatever may be said of the character of the homestead estate, it is considered as an entirety, and the interests of the husband and wife are not separable. The judgment against Lewis could have no prospective effect, and if at the time of its rendition it was inoperative, it could not be put into opera-

tion by a subsequent abandonment of the land as a homestead.'

"To the same effect is the case of Campbell v. Elliott, 52 Tex. 151."

In *Smith* v. *Waverly, supra,* decided in 1940, holding the judgment against the husband alone void in a homestead case, the Court said:—

"The rule in Texas is that a wife is a necessary party to a foreclosure suit brought against the husband alone, provided there is any defense that the wife *could* have urged, growing out of her homestead rights, *which would have defeated* the action."

In disposing of the case the Court said:—"As the judgment foreclosing the vendor's lien against the homestead was absolutely void as against Lucy Smith, it was also absolutely void as against her husband, Monroe Smith. Mexia v. Lewis, supra; Martin v. Astin, supra; Harper v. Stewart, 179 S. W. 277, supra; Seay v. Fennell, 39 S. W. 181." (Writ of Error denied).

It is not strange, therefore, that among twelve different Courts of Civil Appeals in Texas, in an uncontested case an erroneous opinion of the law should occasionally vary from all the other appellate tribunals. If the victim of such error as Flowers was, saw fit to submit when the remedy was available to correct it, but not used—that incident neither changes the jurisprudence of the State nor destroys the rights of other citizens as was done here.

Like the *Frazier* case, Flowers and wife had acquired title to 160 acres as a homestead. The technical land owners of the large survey, suing others, including Flowers without his wife as a party, recovered judgment against him. Afterwards Flowers and his wife sought an injunction to prevent ouster from their homestead under this judgment. The trial court, under the established law of the State, granted

the injunction, holding the judgment void. The defendants appealed to the Galveston Court of Civil Appeals. The record shows that Flowers and wife did not appear by counsel or contest the appeal. The uncontested case was reversed and there it ended.

Respondents in their answer to petitioners in the Supreme Court (R. 41) said:—

"In answer to the contention * * * we simply refer to the opinion in Breath et al v. Flowers, et al., supra, wherein the Court held that title had vested in Flowers and wife at the time of the institution of the suits against Flowers, to which his wife was not a party, but that, nevertheless, the plea of homestead would have been no defense to such suits, that the wife was not a necessary party thereto and that the judgments therein were binding upon her and an effectual bar to her rights."

In other words the equal, invested title and estate of the wife is divested out of her by a judgment against another. That is this case and that was the *Flowers* case. Flowers submitted. The petitioners have not submitted—even if the Court of final review in Texas refused to correct the error and protect them in their constitutional rights, both state and federal.

The case presents one of two alternatives: either (1) the shield of protection forged by the constitution and statutes of Texas for the millions of homesteads in the State against the acts of ignorance, negligence or fraud of husbands, has been shattered and destroyed by the judicial orders in this cause; or (2) these litigants have been arbitrarily denied the legal right and protection vouchsafed and granted to all other persons in like status.

Authorities

(cited to the lower court)

Hansberry v. *Lee* (1940) 85 L. Ed.. U. S. 22, reversing an Illinois Supreme Court decision on certiorari granted (84 L. Ed. 1002), in which the Supreme Court of the United States decided a question identical in principle with that presented in this record.

The Illinois Supreme Court by adjudicating that defendants in suit to enjoin breach of agreement restricting the use of certain land were bound by a judgment rendered in an earlier litigation to which they were not parties, deprived them of "due process of law," where agreement did not purport to create a joint obligation or liability, defendants in earlier litigation, which was a suit to enforce agreement, were not treated by pleadings or decree as representing others, or as foreclosing by their defense the rights of others.

In that case Mr. Justice Stone said:—"The question is whether the Supreme Court of Illinois by its adjudication that petitioners in this cause are bound by a judgment rendered in an earlier litigation to which they were not parties, has deprived them of the due process of law guaranteed by the 14th Amendment." (p. 25).

The fourth syllabus is as follows:—"The enforcement of a judgment against the person or property of one not designated as a party, nor made a party by service of process, violates the due process clauses of the 5th and 14th amendments." (*id.* p. 22).

And again:—"State courts are free to attach such descriptive labels to litigations before them as they may choose, and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the

United States. But when the judgment of a State court ascribing to the judgment of another court the binding force and effect of *res judicata* is challenged for want of due process, it becomes the duty of this court to examine the course of procedure in both litigations, to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. *Western Indemnity Ins. Co.* v. *Rupp*, 225 U. S. 261.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party, or to which he has not been made a party by service of process (citing cases). . . . A judgment rendered under such circumstances is not entitled to the full faith and credit which the constitution and statutes of the United States . . . prescribes."

In *Postal Tel. Cable Co.* v. *Newport*, a Kentucky case, 247 U. S. 464, 62 L. Ed. 1215, the Court held that the opportunity to be heard is an essential requisite of "due process of law" in judicial proceedings. And as a State may not consistently with this amendment enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot without disregarding the requirements of "due process of law" give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

It is established by the adjudications of the U. S. Supreme Court that a state may not, by its Legislature or its Courts, adjudicate the rights of a citizen of the United States, without subjecting such person to the jurisdiction of the court assuming to affect his right, by process sufficient in fact to bring such person before the Court, and that an adjudica-

tion in the absence of such prerequisite affecting his rights is null and void.

There are two striking illustrations of this:

Scott v. *McNeal,* 154 U. S. 34. The State of Washington had a statute providing that after an absence from the State for a period of seven years, under circumstances suggesting that he was unheard of and therefore dead, such person should be deemed to be dead and his estate be subject to administration and disposal as a deceased person.

Under this provision a man named Scott disappeared from his home and was not heard from for seven years, and his estate was administered upon by the probate court in regular form, and his property was sold and transferred to another. Shortly after that time he returned home and demanded that the purchaser of his property surrender it to him. That was refused and he brought suit to recover it. The District Court of the State decided against him. He appealed to the State Supreme Court, which affirmed the judgment of the lower courts, holding that under the statute law of the State and the decision of the lower court he was correctly adjudicated to be dead.

He applied to the Supreme Court of the United States upon the ground that he had been deprived of his property "without due process of law," although, in form, due process had been complied with in every respect. The Supreme Court decided that the man was still alive, and that the power of the Court to adjudicate him dead and appropriate his property was a violation of "due process of law," and ordered the State authorities to deliver him his property, reversing the decision of the Supreme Court of the State.

Coe v. *Armour Fertilizer Works,* 59 L. Ed. U. S. 1027: This is another case of similar nature from Florida. That State had a statute that the stockholders of corporations

should be bound by a judgment rendered against the corporation alone; and a citizen of Florida, without being in the case as a defendant, but being a stockholder of the defendant corporation, had his property levied upon by writ of execution. The Supreme Court of Florida affirmed the judgment of the lower court sustaining the court's jurisdiction and the liability of the stockholder on the judgment against his corporation. The United States Supreme Court held that the entire proceeding was void, as violative of "Due process of law," and discharged the stockholder from the penalties of the judgment.

Great Northern Rwy. Co. v. *Sunburst O. & R. Co.*, 287 U. S. 358-367, 77 L. Ed. 360. The point that the proposition that the constitutional questions here presented were timely raised and duly presented in the lower court is established by the decision of this Court in the above cited case.

III

In the event your Honors grant the Writ of Certiorari, the Court is asked to consider and decide, upon the merits of the case the following Assignments of Error, duly presented below and overruled.

Assignments of Error

The Court of Civil Appeals, and the Supreme Court in refusing the writ of error, erred:

1

In affirming the judgment of the trial court on the ground that appellants showed no title to the mineral estate sued for by them.

2

In failing to find and hold that appellants are entitled to a recovery of the property sued for by them on the title thereto which they established by undisputed evidence.

3

In affirming the judgment of the trial court on the ground that the judgment rendered on September 26th, 1899, by the District Court of Hardin County, Texas, in cause No. 570, styled *W. S. Frazier* v. *Texas Pine Land Association,* divested W. S. Frazier and his wife of the title to the property covered by that judgment.

4

In failing to rule that the adverse possession of Frazier and his wife to their 160 acre homestead tract was not interrupted by the entrance of tenants of E. A. Irvin upon other parts of the Brooks league.

5

In failing to rule that the title asserted by appellants herein is not defeated by the attempted reservation of oil and minerals in the deed dated June 9, 1902, from Houston Oil Co. of Texas to W. S. Frazier.

6

In failing to rule that the appellees have no title to the property herein sued for, under the three years statute of limitation.

Conclusion

It is therefore respectfully submitted that this cause is one calling for the exercise by this Court of its supervisory power, and petitioners pray the Court to grant the writ of

certiorari, and thereafter to review and reverse the decision of the Court below. And they pray for such other relief as they may be entitled to.

Respectfully submitted,

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(1888)

No. [illegible]

MARY WAY KEMP [illegible], Petitioner,

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL., Respondents.

RESPONDENTS' REPLY TO PETITION FOR CERTIORARI

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SUBJECT INDEX

	PAGE
STATEMENT OF THE CASE	1
REPLY TO JURISDICTIONAL GROUNDS RELIED ON BY PETITIONERS	3
CONCLUSION	10

LIST OF AUTHORITIES

CASES

	PAGE
Atchison, Topeka & Santa Fe Railway Co. v. Railroad Commission of California, et al., 283 U.S. 380, 390-391, 75 L. Ed. 1129, 1136	5
Behrens v. Behrens, 186 S.W. (2d) 695	8
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680, 74 L. Ed. 1107, 1113	4
City of Chicago v. Robbins, 67 U.S. 418, 17 L. Ed. 289	10
Cooley v. Miller, et al., 228 S.W. 1058, 1086	7
Jergens v. Schiele, 61 Tex. 255	6
Kibbe v. Ditto, 93 U.S. 674, 23 L. Ed. 1005	10
Mexia v. Lewis, et al., 21 S.W. 1016	8
O'Connor v. Texas, 202 U.S. 501, 50 L. Ed. 1120	10
Senn v. Tile Layers Protective Union, 301 U.S. 468, 477, 81 L. Ed. 1229, 1235	5
Stark v. Hardy, et al., 29 S.W. (2d) 969, 969	9
Supreme Lodge, Knights of Pythias v. Meyers, 265 U.S. 30, 32, 68 L. Ed. 885, 888	4
Tyler v. United States, 281 U.S. 497, 74 L. Ed. 991	10
White v. Burnley, 61 U.S. 235, 251, 15 L. Ed. 886, 890	9

CONSTITUTION OF THE UNITED STATES

Article 14, Section 1	3

REVISED CIVIL STATUTES OF TEXAS

Article 5510	2

TEXTS

40 C. J. S. 431, Section 2	6
40 C. J. S. 433, Section 3	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 272

MARY WALL KIRBY, ET AL., *Petitioners,*

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL., *Respondents*

RESPONDENTS' REPLY TO PETITION FOR CERTIORARI

Statement of the Case

Respondents are not able to concur fully in the STATEMENT as made by Petitioners. It omits certain features Respondents deem material and Respondents, therefore, submit the following:

Petitioners sued Respondents in trespass to try title seeking recovery of the mineral estate in and to 19 acres of land of the George W. Brooks League in Hardin County, Texas. As the surviving wife and heirs at law of Dr. H. S. Kirby, deceased, Petitioners claim title through a deed from W. S. Frazier and wife L. J. Frazier to Dr. Kirby of date August 2, 1904 (R. 17-18). No record or paper title to the mineral

estate involved was shown in Frazier and wife, it being Petitioners' contention that such parties had title by virtue of Article 5510 of the REVISED CIVIL STATUTES OF TEXAS, the ten-year limitation statute.

There was evidence that in 1873 or 1874 Frazier and wife moved upon the Brooks League and in 1884 he caused 160 acres, including the 19 acres here involved, to be surveyed and marked on the ground and asserted claim thereto.

In 1896 W. S. Frazier brought suit in trespass to try title against Texas Pine Land Association, the owner of the land, for the 160 acres he was claiming. He specifically pleaded the provisions of Article 5510, R. C. S. On September 26, 1899, judgment was rendered and entered in such suit whereby it was decreed that Frazier "take nothing" and that Texas Pine Land Association, on its cross-action, recover of and from said Frazier title and possession of the Brooks League and especially the 160 acres described in Frazier's petition (R. 15-16). L. J. Frazier, wife of W. S. Frazier, was not a party to such suit.

On June 9, 1902, Houston Oil Company of Texas, having acquired the title of Texas Pine Land Association by deed dated July 31, 1901, conveyed to W. S. Frazier 80 acres of the Brooks League, including the 19 acres here involved, especially reserving and excepting "the oil and minerals upon or under the land herein conveyed." This conveyance was accepted and filed for record by Frazier (R. 5).

Among other defenses urged in this case, Respondents pleaded the judgment of 1899 in the Texas Pine Land Association case as res judicata of the title or claim of title of Frazier and wife as of that date and contended that whatever title the Fraziers might have had vested in Texas Pine Land Association by virtue of the judgment.

The Trial Court instructed a verdict and rendered judg-

ment in favor of Respondents but did not specify on what theory or defense such action was based. As shown by the Opinion of the Court of Civil Appeals (R. 9-10), that Court affirmed the judgment of the Trial Court on the theory that the 1899 judgment was res judicata and divested Frazier and wife of any title they might have had on the date of the judgment. In this connection the Court held that the wife of W. S. Frazier was not a necessary party to such suit and that the judgment against the husband alone was binding as against both husband and wife since the land involved, if owned by them, was community property.

Writ of Error was refused by the Supreme Court of Texas (R. 55) and Motion for Rehearing was overruled (R. 90).

Reply to Jurisdictional Grounds Relied on by Petitioners

The entire contention of Petitioners is that the land involved in the case of Frazier v. Texas Pine Land Association was the community homestead of W. S. Frazier and his wife, L. J. Frazier, and that the holding of the Texas courts that the judgment rendered in such case against Frazier alone is binding and conclusive against Frazier and wife, and Petitioners who hold under them, constitutes a denial of "due process of law" and is therefore in violation of Article 14, Section 1, of the CONSTITUTION OF THE UNITED STATES. In other words, they contend that Mrs. Frazier was denied "due process of law" because she did not have "her day in court."

Whether such holding is in violation of the "due process" provision of the Federal Constitution depends upon a determination of whether or not Mrs. Frazier was a necessary party to such suit in order to be bound and concluded by the judgment rendered therein. A determination of this question involves and requires a construction of the homestead pro-

visions of the Constitution and statutes of the State of Texas. If such homestead provisions, when construed by the Tribunal whose construction thereof is final and conclusive, do not require that the wife be a party to an ordinary trespass to try title suit (such as was the case of Frazier v. Texas Pine Land Association) involving the community homestead in order to render a judgment or decree against the husband alone valid and binding on and conclusive against both husband and wife then, certainly, it cannot be said that the wife, or any one holding under her, has been denied the protection of the "due process" provision of the Federal Constitution.

The question, then, is raised: What Tribunal is authorized to construe these provisions in order that such construction shall be final and conclusive?

Many decisions of this Honorable Court, as well as decisions of other Federal courts, answer the question posed, and the answer, under such decisions, is the Supreme Court of Texas.

In the case of SUPREME LODGE, KNIGHTS OF PYTHIAS, v. MEYERS, 265 U.S. 30, 32, 68 L. Ed. 885, 888, this Honorable Court affirmed a judgment of the Supreme Court of Nebraska. In the course of the opinion it is said:

> "Under the settled rule of this court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the state, fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein."

This Honorable Court, in the case of BRINKERHOFF-FARIS TRUST & SAVINGS CO. v. HILL, 281 U.S. 673, 680, 74 L. Ed. 1107, 1113, on writ of certiorari to the Supreme Court of the State of Missouri, held:

> "It is true that the courts of a state have the supreme power to interpret and declare the written and unwrit-

> ten laws of the state; that this court's power to review decisions of state courts is limited to their decisions on Federal questions; and that the mere fact that a state court has rendered an erroneous decision on the question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court."

In the case of ATCHISON, TOPEKA & SANTA FE RAILWAY CO. v. RAILROAD COMMISSION OF CALIFORNIA, ET AL., 283 U. S. 380, 390-391, 75 L. Ed. 1129, 1136, in reviewing a decision of the Supreme Court of California, this Honorable Court said:

> "The decision of the state court is conclusive so far as the constitution and laws of the state are concerned."

In affirming a judgment of the Supreme Court of the State of Wisconsin, in the case of SENN v. TILE LAYERS PROTECTIVE UNION, 301 U.S. 468, 477, 81 L. Ed. 1229, 1235, this Honorable Court held:

> "Those issues involved the construction and application of the statute and the Constitution of the State. As to them the judgment of its highest court is conclusive."

That the homestead rights, privileges and immunities here relied upon by Petitioners are rights, privileges and immunities created by the Constitution and statutes of the State of Texas cannot be doubted. Any homestead right that Mrs. Frazier enjoyed with respect to the land involved in the Texas Pine Land Association case was by virtue of the constitutional and statutory provisions of the State of Texas

and by virtue of nothing else. The Constitution, Code and laws of the United States make no provision for homestead exemptions or rights. Such were unknown to the common law.

In 40 C. J. S. 431, Section 2, it is said:

> "At common law there was no such thing as a homestead right, * * *. Homestead rights, therefore, exist only by virtue of constitutional and statutory provisions creating them. Such provisions have been enacted in nearly every state of the Union, the earliest being that enacted by the Republic of Texas in 1839."

And, again, in 40 C. J. S. 433, Section 3, it is said:

> "The homestead interest depends entirely on organic or statutory provisions, nothing like it being known at common law, * * * ; and there can, of course, be no greater right in the homestead property than is created by these provisions."

It thus clearly appears, from the authorities hereinabove quoted, that the homestead question raised in this case is one arising entirely out of the Constitution and statutes of Texas, that it must be determined by a construction of such Constitution and statutes, and the construction placed upon these by the Supreme Court of Texas is final and conclusive and will be accepted as such by the Supreme Court of the United States.

The early case of JERGENS v. SCHIELE, 61 Texas 255, decided by the Supreme Court of Texas in 1884, involved the question of the validity of a judgment in a former suit to which appellant's wife was not a party, the land involved being their homestead.

In holding that the wife was not a necessary party to

such suit and that the judgment rendered therein was binding and conclusive of the issue adjudicated, the court said:

> " * * *. To such a suit the wife was not a necessary party, and her presence in the cause would not have made the decree rendered in it any more binding than if obtained against the husband alone, unless she was an essential party by reason of the fact that the homestead was located on the premises.
>
> "If there was any defense that could have been urged growing out of her homestead rights which would have defeated the action, then she was a necessary defendant in the cause."

In holding that the wife was not a necessary party to a suit involving the homestead and that she was bound by an adverse judgment against her husband in such case, the Commission of Appeals, in the case of COOLEY v. MILLER, ET AL., 228 S.W. 1085, 1086, in which the judgment of the Commission was adopted by and entered as the judgment of the Texas Supreme Court, held:

> "It is not necessary to cite authority upon the now elementary proposition that the wife is not a necessary party to an action against the husband to try the title to, affect an interest in, or foreclose a lien upon community real estate. In determining whether the wife's homestead interest alone renders her a necessary party to an action affecting property impressed with the homestead exemption, the test laid down by our Supreme Court is whether the plea of homestead would in itself be a defense to the suit."

There are many, many other cases by the Supreme Court and the various Courts of Civil Appeals of Texas in which the legal principle as set forth in the above cases is adhered

to. We deem it neither necessary nor proper to cite and quote from such cases here, some of which are cited and discussed in Respondents' Answer to Petition for Writ of Error in the Supreme Court of Texas (R. 37-42) and we call attention to that portion of the Record.

The very holding of the Supreme Court of Texas in the case here under consideration, as evidenced by the refusal of writ of error, is such a construction of the homestead provisions of the Constitution and statutes of the State of Texas. The holding in this case is not in conflict with the holding of the Supreme Court of Texas in any case heretofore decided by ~~this~~ Court.

It is quite true that in some types of cases involving homestead rights in Texas the wife is a necessary party and judgments rendered against the husband alone in such cases are void and are not binding and conclusive. Such cases are those involving the foreclosure of an unauthorized lien against the homestead, those involving a simulated sale of the homestead and those involving foreclosure of a lien not executed by the wife in accordance with the statutes of Texas. All of the cases cited by Petitioners in support of their contention are cases falling within the above categories with the exception of MEXIA v. LEWIS, ET AL., 21 S.W. 1016, and BEHRENS v. BEHRENS, 186 S.W. (2d) 695, neither of which has the approval of the Supreme Court of Texas and both of which are discussed in the Opinion in this case. All of such cases are discussed in Respondents' Answer to Petition for Writ of Error in the Supreme Court of Texas (R. 42-47), and attention is respectfully called to that portion of the Record.

The case of Frazier against Texas Pine Land Association did not involve a lien or simulated sale or transaction. It was, as shown by the petition, an ordinary suit in trespass to try

title brought by Frazier, who had no record or paper title but whose entire claim of title was by virtue of the Texas ten-year limitation statute, against Texas Pine Land Association, the owner of the record title to the land involved, in which the defendant filed a cross-action. The judgment rendered was not based upon any agreement but, as shown by the judgment itself (R. 15-16), was a judgment rendered by the court after "having heard the pleadings read and the evidence submitted." The fact that the land involved was claimed by the Fraziers as their homestead would not have *in itself* constituted a cause of action or a ground of defense.

The fact that the judgment contains the recital "the plaintiff thereupon not appearing further to prosecute this cause" does not render the judgment less valid, binding and conclusive of the issue there adjudicated, such issue being that Frazier had no title to the land involved but that the title was in his adversary. A similar situation was passed on by the Commission of Appeals of the Supreme Court of Texas in the case of STARK v. HARDY, ET AL., 29 S.W. (2d) 969, 969, wherein it was held:

> "The mere announcement of the plaintiffs that they would prosecute their suit no further, did not divest the court of jurisdiction of the parties and the subject-matter of the suit; the court therefore had the power to render the judgment it did."

There is another well settled principle of law that has been followed by this Honorable Court uniformly. This is the principle that the Supreme Court of the United States, and other Federal Courts, will adopt and follow the construction of the highest court of the state respecting state statutes on which the title to land depends. In the case of WHITE v. BURNLEY, 61 U.S. 235, 251, 15 L. Ed. 886, 890, this Court said:

> "We have endeavored carefully to follow the doctrines of the Supreme Court of Texas in this opinion, because we are bound to follow the settled adjudications of that State in cases affecting titles to lands there."

Other cases announcing the same principles are:

City of Chicago v. Robbins, 67 U.S. 418, 17 L. Ed. 289;
Kibbe v. Ditto, 93 U.S. 674, 23 L. Ed. 1005;
O'Connor v. Texas, 202 U.S. 501, 50 L. Ed. 1120;
Tyler v. United States, 281 U.S. 497, 74 L. Ed. 991.

In the interest of brevity, we will not discuss the cases cited by Petitioners on pages 15-18 of their Petition for Writ of Certiorari. It is true that in such cases this Honorable Court held that under the facts there presented the "due process of law" provision of the Federal Constitution had been violated. We say, however, that those cases presented entirely different factual and legal situations to the factual and legal situation presented in the case under consideration and are not applicable.

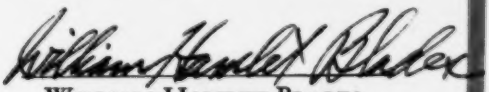
Respondents respectfully submit that under the holdings of the Supreme Court of Texas, in construing the homestead provisions of the State Constitution and statutes, Mrs. L. J. Frazier had no such rights under the homestead laws as rendered it necessary that she be made a party to the Texas Pine Land Association case. Therefore, she was not denied "due process of law" or any other protection, right, privilege or immunity guaranteed to her by the 14th Amendment to the Constitution of the United States.

Conclusion

Respondents respectfully submit that no Federal question is presented requiring a review of this case by this Honorable

Court and Respondents pray that Writ of Certiorari be denied.

Respectfully submitted,



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Supreme Court of the United States

OCTOBER TERM, 1947

No. 272

MARY WALL KIRBY, ET AL., *Petitioners,*

v.

HOUSTON OIL COMPANY OF TEXAS, ET AL., *Respondents*

MOTION FOR REHEARING

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully move the Court to set aside its order in this case of October 13, 1947, denying the writ of Certiorari, and to grant the relief sought, for the following reasons.

"Speaking frankly:" The result denying Petitioners their constitutional rights was unquestionably achieved by a false theory put forth in Respondents' answer, false because indisputably at variance with the facts of this case, erroneously assumed, and with the settled decisions of this Court applicable to the true facts.

This is why this counsel in over thirty-five years' practice before this court, files for the first time a motion for a rehearing.

The defense presented in Respondents' answer in actual fact or in law, has nothing to do with the issue presented by these Petitioners. The true fact in this case and the law governing it, are presented by Petitioners and the answer is a general denial of the jurisdiction of this Court.

I.

What Are the True Facts?

(1) The Constitution of Texas created an estate in Louisa Frazier and her husband in a homestead and prohibited the "owner, if a married man (to)sell the homestead without the consent of the wife, given in such manner as may be prescribed by law." It further prohibited the husband without such joinder to deed or mortgage it and declared that "all pretended sales of the homestead involving any condition of defeasance shall be void."

(2) The Texas Statute, Art. 4618, declares that "The homestead, whether the separate property of the husband or wife, or the community property of both, shall not be disposed of except by the joint conveyance of both." (Copied in Petition, p. 7-8)—also statute giving form of wife's necessary and indisputable consent thereto (p. 8). Thus was the title to the homestead estate invested equally in the husband and the wife, incapable of being divested by or against one alone.

(3) The Court of final resort of Texas, without a single dissent from its earliest to its latest decisions, has construed these constitutional and statutory laws—which are unam-

biguous and incapable of amendment or perversion by any court's construction against their plain language—to the effect that all attempts at divestiture of the family homestead by the husband alone are utterly void, both as to the wife and even as to the husband (Petition 6; 10-14). The Texas Supreme Court has also consistently held that what the husband was prohibited to do of his own volition, he could not do through the agency of another or of his wife who was denied the power of such agency, or forced to do by any court or other state agency.

The reason is, that there is not a word or inference in the Constitution or the Statutes that confers such power, agency or capacity upon the husband or court to do so. To do that prohibited thing as has been imputed here by the claimed and presumed construction of the highest Texas Court, is wholly arbitrary and without foundation. (See Petition, pp. 10 to 14, and Grounds One, p. 6, and Ground Two, p. 10, the statements and ruling being nowhere traversed or disputed by Respondents, except by "general denial.")

(4) Notwithstanding the Constitution and Statutes, and the uniform decisions of the court of last resort of Texas; notwithstanding the undisputed fact that Mrs. Frazier was invested with this estate under these laws, the court below held that her unquestioned title, interest and estate in this land, established by undisputed facts of record, was divested out of her by a judgment rendered against her husband alone without her presence and without her authority, in spite of the Fifth and Fourteenth provisions of the CONSTITUTION OF THE UNITED STATES.

That judgment under Texas law was as ineffective against her and that homestead as if rendered against William Smith, a total stranger. (See Petition, pp. 11-12.)

II.

The Decisions of the United States Supreme Court on This Issue

In Respondents' answer (p. 8), referring to two Texas cases (the LEWIS and the BERHENS cases) holding judgments against the husband alone void as to wife not a party, and also void as to husband himself, identical in facts with this case, our honorable adversary has stated: "Neither of which has the approval of the Supreme Court of Texas."

We regret to say counsel's statement is not correct. The true facts are given by Petitioners (p. 11 to p. 13, citing and quoting from the official reports contrary to that assertion).

Thereupon Respondents, citing and quoting from several of this Court's decisions, have laid down this proposition:

> "Those issues involved the construction and application of the statute and the Constitution of the State. As to them the judgment of its highest court is conclusive."

Such decisions are, of course, correct on the facts there involved between parties legally present as parties before the court. But Petitioners have presented no such case here. We will let this Court answer counsel.

These identical decisions *eo nomine* were presented to this Court by the respondents in HANSBERRY v. LEE, 311 U.S. 32, 85 L. Ed. 22, a case identical with Petitioners' in fact and in law—on the issue here.

This Court, speaking through its late distinguished Chief Justice, thus declared the law:

> "State courts are free to attach such descriptive labels to litigations before them as they may choose, and to at-

tribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a State court ascribing to the judgment of another court the binding force and effect of *res judicata* is challenged for want of due process, it becomes the duty of this court to examine the course of procedure in both litigations, to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. Western Indemnity Ins. Co. v. Rupp, 225 U.S. 261.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party, or to which he has not been made a party by service of process (citing cases) * * * A judgment rendered under such circumstances is not entitled to the full faith and credit which the constitution and statutes of the United States * * * prescribe."

The fourth syllabus is as follows:

> "The enforcement of a judgment against the person or property of one not designated as a party, nor made a party by service of process, violates the due process clauses of the 5th and 14th amendments." (Id. p. 22.)

The accepted rule of statutory construction is thus stated:

> "Nothing is better settled than that, in the construction of the law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written." (U. S. v. STANDARD BREWERY, 251 U.S. 210.)

There is no ambiguity or uncertainty of meaning in the Constitution and the Statute concerning this matter. Nor is

there any uncertainty as to the uniform construction in exact harmony with the written law by the courts of last resort in Texas. The judgment in this case, therefore is arbitrary, unreasonable and condemned by the Constitution of the United States in Amendments 5 and 14.

See Notes and authorities cited in Vol. I, SUPREME COURT LAW" by HENNOLD, p. 542, etc.

Even in the case of JERGENS v. SCHIELE, 61 Texas 255, mainly relied upon by Respondents (see Answer in Supreme Court of Texas, p. 18; Answer in this Court, p. 6), the Supreme Court of the State directly held that the wife (Mrs. Jerkens) had the opportunity in the second suit where she was a party, to prove the facts as to her rights assumed to have been affected in the first suit against her husband, wherein she was not a party; the Court holding expressly that she had failed to produce any evidence showing that any right of hers had been affected by the former suit, and therefore denied her any relief.

Your Honors cannot consistently deny the constitutional rights of the Petitioners by refusing jurisdiction of this case on the assumption that there may have been non-federal grounds upon which the State Court may have entered a judgment, although the opinion expressly declined in the lower court to pass upon any question except the federal right here asserted.

It was decided by this Honorable Court in ANDERSON v. BRAND, 303 U.S. 95, 82 L. Ed. 685, in Syllabus 1, as follows:

> "Where a state court does not decide against a petitioner or appellant upon an independent state ground, but, deeming a federal question to be before it, actually entertains and decides that question adversely to the federal right asserted, and the Supreme Court of the United States has jurisdiction to review the judgment, if it is a final judgment; and cannot refuse jurisdiction

because the state court might have based its decision, consistently with the record, upon an independent and adequate non-federal ground."

It is respectfully submitted that this motion should be granted, and the Writ of Certiorari prayed for in the petition be awarded. We pray for such relief.

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Certificate of Counsel

I, William D. Gordon, Attorney for the above named Petitioners, hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

I further certify that a copy of this petition or motion is contemporaneously furnished to the Honorable William Hamlet Blades, 915 Petroleum Building, Houston, Texas, Attorney for Respondents.

W. D. GORDON,
Counsel for Petitioners